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FILED
AUG 17 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 265

MILDRED M. WETHERBEE, ADMINISTRATRIX of the Estate of John P. Wetherbee, Deceased,

Petitioner,

vs.

ELGIN, JOLIET and EASTERN RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, Mildred M. Wetherbee, Administratrix of the Estate of John P. Wetherbee, deceased, respectfully petitions for a writ of certiorari to review the final judgment and decision of the United States Court of Appeals for the 7th Circuit, reversing a judgment for $80,000, in favor of petitioner and against Elgin, Joliet and Eastern Railway Company, a corporation, in an action brought under the Federal Employer's Liability Act, 45 United States Code Annotated, Section 51, *et seq.*

OPINIONS BELOW

The opinion of the United States Court of Appeals, for the 7th Circuit in the second appeal is reported in *Wetherbee, Administratrix, etc.*, v. *E. J. & E. Ry. Co., a Corp.*, • • • (not yet officially reported), Copy of Opinion, R166 *et seq.*)

The opinion of the United States Court of Appeals, for the 7th Circuit, on the first appeal, is reported in 191 F. 2d 302.

JURISDICTION.

This action arose and was determined under the Federal Employers' Liability Act, 45 U.S.C.A., Section 51, *et seq.*, for fatal injuries sustained while decedent was serving as a *switchman in yard service on a loading and unloading track.* In the first appeal, the Court of Appeals held that it thought the verdict was excessive according to the weight of the evidence and therefore *"scanned the trial record more closely for error"* and ultimately reversed the judgment and granted respondent a new trial for the following errors: that the jury did not take into consideration decedent's contributory negligence and diminish the damages by any appreciable amount; that deceased was guilty of contributory negligence as a matter of law; although properly instructed the jury disregarded both the evidence and the instructions: 191 F. 2nd 302, 310; and that while the admission of the Tables of Mortality themselves was not error, the actuary's testimony of his calculations, which were based partly on the tables admitted over respondent's objection, was error, 191 F. 2nd, 302, 311.

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 United States Judicial Code, as enacted by the 80th Congress-2nd Session, 1948, effective

September 1, 1948. The judgment of the Court of Appeals was entered on the 20th day of March, 1953 (R. 171) and petitioner's motion for re-hearing was denied by that court on the 22nd day of May, 1953 (R. 174) making the judgment final. Cases believed to sustain jurisdiction are:

Wilkerson v. *McCarthy,* 336 U.S. 53, 69 S. Ct. 413.

Ellis v. *Union Pac. R. Co.,* 329 U.S. 649, 67 S. Ct. 598.

Tennant v. *Peoria & P. U. R. Co.,* 321 U.S. 29, 64 S. Ct. 409.

LAW INVOLVED.

The pertinent provisions of the Federal Employers' Liability Act, 45 U.S.C.A., Section 51, *et seq.,* and 7th Amendment to the United States Constitution.

COURT HISTORY OF THE CASE.

This action was brought in the United States District Court for the Northern District of Illinois, Eastern Division, and was originally tried before the Honorable Walter J. LaBuy, and a jury, resulting in a verdict and judgment for the petitioner for Eighty Thousand ($80,000) Dollars. From this judgment respondent appealed. The United States Court of Appeals reversed the judgment and remanded the cause for a new trial on May 23, 1951. The Court's opinion in the first appeal is reported in 191 F. 2d 302.

The case was re-tried before the Honorable Charles G. Briggle and a jury. At the conclusion of petitioner's evidence, the Court directed a verdict in favor of respondent and petitioner appealed, Cause No. 10631. On this second appeal, the United States Court of Appeals affirmed the judgment of the United States District Court

on March 20, 1953, (Court's opinion R. 166), and overruled petitioner's motion for re-hearing on May 22, 1953. (R. 174)

Petitioner prays review of these two proceedings and decisions.

THIS COURT IS EMPOWERED TO REVIEW THE PROCEEDINGS AND DECISIONS IN BOTH APPEALS.

In the first appeal of this cause, the verdict in favor of petitioner was reversed and remanded for a new trial, 191 F. 2nd 302.

In the second appeal of this cause, the trial court directed a verdict at the close of petitioner's evidence in favor of respondent (R. 139). The Court of Appeals affirmed the judgment of the trial court on the second appeal, on March 20, 1953 (R. 166) and on May 22, 1953, denied the petition for rehearing making the judgment final (R. 174).

This Court, according to its decision in *Urie* v. *Thompson*, 337 U.S. 163, 69 S. Ct. 1018, is invested with the power to review all proceedings and judgments in both appeals. Although petitioner did not have a right of review by this Court on the first appeal, this Court has not lost its jurisdiction to review the holding on that appeal. Petitioner has now invoked the jurisdiction of this Court at the first opportunity open to her.

STATEMENT OF MATTER INVOLVED.

This is an action under the Federal Employers' Liability Act, 45 U.S.C.A., 51-59, to recover damages for the death on May 14, 1948, of petitioner's decedent, John P. Wetherbee, a switchman employed by the respondent railroad company. At the time of his death, Wetherbee

was 40 years of age (R. 82) and had been in the respondent's employ for 20 years (R. 83). Prior to May 14, 1948, he had been in good health. (R. 84). His widow and four minor children survived him (R. 82). Decedent's gross earnings for 1947 were $5,767.22 (R. 86). His net earnings were $4,763.39. (R. 89).

At the time of his fatal injuries, Wetherbee was engaged in his duties as a switchman (R. 29). The accident occurred on the North "J" track, inside the plant of the Ruberoid Company in Joliet, Illinois, at approximately 2:25 P.M. (R. 185). Wetherbee died as a result of his injuries at about 5:50 P.M. on the same day. (R. 180).

The Ruberoid plant is enclosed by a fence, the railway tracks coming through a gate at the north side. (R. 206). About 2:21 P.M., on May 14th, one of the respondent's switch engines entered the plant through this gate, shoving a Great Northern box car which it had picked up outside the fence. (R. 187, 188, 207). Inside the enclosure there were two tracks running in a Northerly and Southerly direction. (R. 20, 146). "K" track extended northward to and through the gate of the enclosure, "J" track branched off of "K" track about 200 feet south of the gate. At the junction of the two tracks was a switch. (R. 146). From that point, "K" track continued down through the enclosure East of "J" track. (R. 146). From the point of the switch, "J" track continued in a southerly direction and alongside two loading and unloading platforms. (R. 20, 146). Both "K" track and "J" track terminated at the south end of the fenced enclosure within the Ruberoid property. (R. 146). The north loading platform was about 108 feet long and about 4 feet high (R. 20, 146) and immediately south of it was a truck crossing, or roadway (R. 146). Immediately south

of the truck crossing was a second loading and unloading platform (R. 54). The west rail of "J" track was about 5' 2½" from the east edge of the North platform (R. 21). The north loading and unloading platform had been in use many years by the Ruberoid Company in loading and unloading freight cars and trucks. (R. 220, 221). During all that time, while trucks were being loaded and unloaded, blocks, sticks and boards were used by the truckers along and upon "J" track to block the truck wheels. (R. 200). The respondent, through its agents and servants had actual notice of this custom for more than four years prior to the accident. (R. 199). These tracks were owned and maintained by the respondent (R. 185, 215). Prior to May 14th, decedent's crew members had removed blocks, boards, and debris from "J" track along the north loading dock, (R. 199). Prior to the accident, decedent had worked that job off and on but a few months (R. 208), and the custom of truckers using blocks, boards and debris to block the wheels of their trucks was unknown to him, while decedent's fellow employees had known of the custom for several years. (R. 199). Prior to the date of the accident, wooden planking extended on either side and between the rails of "J" track adjacent to the loading platform. (R. 197).

Respondent's switch engine entered the plant shoving a Great Northern box car which it had picked up outside the fence and coupled on to a Pennsylvania box car, located on "K" track. (R. 55-56, 187-188). Venske, one of the switchmen, made the coupling. (R. 56). Venske then was at the switch and after giving a signal to back up north, he started walking southward to guard the truck crossing against the movement. (R. 57, 59). At the first trial, Venske testified that he walked directly from a point marked on the plat (R. 20, 146) to the truck crossing

(R. 65-66) thus raising the inference that he did pass within 5 to 7 feet of the board on the track, and that as he was walking down that way he looked over and couldn't see any obstruction or anything, 191 F. 2nd 302 at page 308.

After clearing the switch of a fouling car, the train backed approximately 200 feet north of the switch (R. 57). When the train started backing north on "K" track, Delander, the foreman, started walking south along the "J" track. (R. 31). Venske, at the same time, started walking southward to the truck crossing. (R. 57). The decedent threw the switch after the train had backed up approximately 200 feet so the train could then proceed southward over onto the "J" track. He gave a proceed signal and the engine then started moving southward on "J" track, shoving the two box cars ahead of it. (R. 188). Decedent then mounted the front end of the leading car on the engineer's side, and held on the grabiron, his feet in the stirrup on the side of the car over the wheels. (R. 189). The stirrup was about 14 inches above the ties and planking. (R. 117).

Decedent was in his proper place and position (R. 189) and under respondent's Rule 101, (R. 45, 229) was required to look for overhead and side obstructions; it was also his duty to watch Venske for signals. (R. 216). There was a concrete wall about four feet high, supporting the loading dock which was 5' 2½" from the west rail of "J" track. (R. 21). The overhang of the box car upon which decedent was riding, occupied 29 inches of that space (R. 114). Decedent was hanging 5 or 6 inches away from the car and decedent's body occupied 15" of the space (R. 115). There was an obstruction from 6" high to 18" high near the concrete wall (R. 234-235). The forward end of the box car left the track and ran along on

the planking for about 29 feet and then suddenly veered toward the retaining wall and scraped along the wall about 15 feet, before being stopped. (R. 112).

Shortly after the car left the track, engineman O'Day saw deceased's body being rolled between the car and the retaining wall. (R. 212). From the injuries then sustained, deceased died some 2½ hours later. (R. 180).

Following the derailment it was found that the planking between and on the sides of the "J" track had been broken and torn up and about at the point of derailment was found a piece of gray-colored wood, about 61" in length, which was of the same color and texture as the planking, extending between and beyond either side of the "J" tracks. (R. 198). This piece of gray-colored wood which caused the derailment, was found after the accident alongside and inside of the west rail of the "J" track, 191 F. 2nd 302, at page 305. At the place where the derailment occurred, the planking between the "J" tracks was approximately one inch higher than the top of the rail. In other words, the top of the rail was lower than the top of the plank between the "J" tracks (R. 75).

It was the duty of every member of the crew, including Venske and Delander, to keep a lookout. (R. 228-229). The evidence on the 2nd trial was substantially the same as on the first, with the exception of the testimony of witnesses Venske and Delander, and petitioner's introduction of respondent's rules 106 and 146, which was new, material and substantially different evidence from that presented on the former trial. Respondent's rule 106 reads as follows: (R. 47)

> "Both the Conductor and the engineman are responsible for the safety of the train and the observance of the rules, and, under conditions not provided for by the rules, must take every precaution for protection."

and its Safety rule 146 reads as follows: (R. 47)

> "Before shoving cars into any track, employee must ascertain whether or not the work can be done safely. When coupling onto or moving cars on any loading, unloading or repair track, he must walk along the track in advance of the cars and make sure that all men are out of the way and any obstructions removed. * * *"

On the second trial, witness Venske testified differently than on the first trial, as the Court of Appeals suggested he might do, 191 F. 2nd 302, at page 308. On the first trial Venske testified that he went *directly* from a point marked on the map to the truck crossing (R. 65-66). On the second trial he testified that he took a roundabout way, not passing within 50 feet of the point of derailment. (R. 67). On impeachment by petitioner's counsel in the second trial, Venske testified that the points he indicated on the first trial that he walked directly from and to, were the switch on "K" track, and the truck crossing (R. 66). It was for the jury to decide which of Venske's stories it believed most reasonable; that in the hurry of switching, Venske took the shortest route, as he testified in the first trial where he passed within 5 or 6 feet of the obstruction, or whether Venske took the roundabout course, and the long, muddy route to get to the South "J" crossing.

QUESTIONS PRESENTED.

1. In an action under the Federal Employers' Liability Act, has the petitioner in both appeals been deprived of the right of trial by jury within the purview of the 7th Amendment to the United States Constitution?
2. In actions brought under the Federal Employers' Liability Act, negligence and contributory negligence are jury questions.

3. If a Court of Appeals concludes an award is *simply* excessive or monstrous, is it empowered to re-weigh the trial record and set aside a verdict and judgment?
4. Is it improper, in a death action under the Federal Employers' Liability Act, to introduce actuarial evidence where the jury is properly instructed?
5. Was the Court of Appeals in error in re-weighing the evidence in both appeals?
6. Was it not for the jury's determination in the second appeal as to whether the violation of safety rules, considered with the evidence as a whole, constituted negligence?

REASONS FOR GRANTING THE WRIT.

I.

In both appeals of this case petitioner has been deprived of her right of trial by jury within the meaning and purview of the Seventh Amendment to the United States Constitution and contrary to the decisions of this Court in the following cases: *Wilkerson* v. *McCarthy*, 336 U.S. 53, 69 S. Ct. 413; *Ellis* v. *Union Pac. R. Co.*, 329 U.S. 649, 67 S. Ct. 598; *Tennant* v. *Peoria & P.U.R. Co.*, 321 U. S. 29, 64 S. Ct. 409 and probably in conflict with *Texas, Pacific-Missouri Pacific Terminal R. Co.* v. *Welsh*, 5th Circuit, 179 F. 2nd 880, 882.

II.

This Court has never had for decision in a Federal Employers' Liability action, the question of the limitation of the power of the Courts of Appeal to review the trial record when it determines the damages are excessive. In the first appeal, the Court of Appeals found that the damages awarded were *excessive*, not that they were grossly excessive or monstrous, 191 F. 2nd 302 at page 308. After

the Court of Appeals determined that the verdict was excessive, basing its authority to do so on the language contained in *Affolder* v. *N.Y.C. & St. L. R. Co.*, 339 U.S. 96, 101, 70 S. Ct. 509, 511, it proceeded to reweigh the evidence and *"scan the trial record more closely for error"* 191 F. 2nd 302 at page 310. This action is contrary to and in direct contravention of the decisions of this Court in the cases of *Southern Railway Co.* v. *Bennett*, 233 U. S. 80, 87, 34 S. Ct. 566, 567 and *Barry* v. *Edmunds*, 116 U. S. 550, 6 S. Ct. 501.

III.

The opinion of the Court of Appeals in the first appeal that the actuarial calculations were error is contrary in principle to the cases of: *Chicago & Northwestern Ry. Co.* v. *Curl*, 8th Circuit, 173 F. 2nd 497; *Stokes* v. *U. S.*, 2nd Circuit, 144 F. 2nd 82 and directly in conflict with *Smith* v. *Pennsylvania R. Co.*, 99 N.E. 2nd 501.

IV.

The Court of Appeals in both appeals and particularly in the first, 191 F. 2nd 302, reweighed the evidence contrary to and in direct violation of the decisions of this Court in the following cases: *Wilkerson* v. *McCarthy*, 336 U.S. 53, 69 S. Ct. 413; *Tennant* v. *Peoria & P.U.R. Co.*, 321 U.S. 29, 64 S. Ct. 409 and *Ellis* v. *Union Pac. R. Co.*, 329 U.S. 649, 67 S. Ct. 598.

V.

In the second appeal, the Court of Appeals erred in not submitting for the jury's determination the violation of safety rules as evidence of negligence in a death action under the Federal Employers' Liability Act. This error of the Court of Appeals is in direct conflict with the decision of this Court in *Tennant* v. *Peoria & P. U. R. Co.*,

321 U. S. 29, 64 S. Ct. 409. It is also in conflict with the decisions in the following cases: *Haines* v. *Reading Co.*, 3rd Circuit 178 F. 2nd 918; *A.T. & S.F. R. Co.*, v. *Ballard*, 5th Circuit, 108 F. 2nd 768, certiorari denied, 310 U.S. 646, 60 S. Ct. 1096; *Frabutt* v. *N.Y.C. & St. L. R. Co.*, 88 F. S. 821 and *Jacobson* v. *Chicago & N.W. R. Co.*, (Supreme Court of Minnesota, 1946) 221 Minn. 454, 22 N.W. 2nd 455.

PRAYER.

Wherefore, your petitioner prays that a Writ of Certiorari be issued out of this Court, directed to the Court of Appeals for the 7th Judicial Circuit, commanding said Court to certify and send to this Court a transcript of the Record in the First Appeal, Cause No. 10205, entitled *Mildred M. Wetherbee, Administratrix of the Estate of John P. Wetherbee, deceased, respondent* v. *Elgin, Joliet and Eastern R.R. Co., a corporation,* including all proceedings in said Court to the end that said First Appeal may be reviewed and determined by this Court and that the judgment of the District Court for the Northern District of Illinois, Eastern Division in the First Appeal be affirmed, or in the alternative, that this cause be reversed and remanded for a new trial as a result of the Courts of Appeals' decision in the Second Appeal wherein a directed verdict against the petitioner was affirmed by said Court.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT OF CASE.

The facts with reference to the two opinions below, jurisdiction of the Court and the Statutes involved have been sufficiently covered in the petition and will not be here repeated.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals in both opinions erred:

1. In the first appeal in holding that the Petitioner's decedent and not the respondent had the duty of making his place of work a safe place in which to perform his duties.

2. In depriving petitioner of the benefits under the Federal Employers' Liability Act of a jury trial in the first appeal and second appeal.

3. In the first appeal by re-weighing the evidence and holding that the verdict was excessive.

4. In the first appeal in holding that the method used in computing actuarial calculations in a death action under the Federal Employers' Liability Act was erroneous.

5. In failing to submit for the jury's determination, in the second appeal applicable safety rules as proper evidence of negligence in a death action under the Federal Employers' Liability Act.

ARGUMENT.

I.

Petitioner's decedent was not the alter ego of respondent.

In the first appeal, 191 F. 2nd 302, at page 306 the Court came to the unfounded and startling legal conclusion that the board that caused the derailment and subsequent death of petitioner's decedent was a *new threat* to safety, and not something about which the railroad itself had previous knowledge, even though boards had on some previous occasions been found on or near tracks in the Ruberoid Plant. In coming to the legal conclusion that respondent had not failed in its duty to furnish decedent with a reasonably safe place to work and that deceased was solely responsible for the occurrence the Court relied upon *Killian* v. *Pennsylvania R. Co.*, 336 Ill. App. 152, certiorari denied, 338 U. S. 819, 70 S. Ct. 63. In relying on the *Killian* case, the Court completely disregarded the cases of *Porter* v. *Terminal Ry. Assn. of St. Louis*, 327 Ill. App. 645, 65 N.E. 2nd 31; *Terminal R. Assn. of St. Louis* v. *Fitzjohn*, 8 Circuit, 165 F. 2nd 473; *Grand Trunk Western R. Co.* v. *Boylen*, 7 Circuit 81 F. 2nd 91; and *Devine* v. *Delano*, 272 Ill. 166, 111 N.E. 742 on the theory that these cases involved accidents under the Federal Employers' Liability Act where permanent structures had been erected allowing insufficient clearance, or where objects had been permitted, with the knowledge of the railroad company, to remain on or near the tracks.

The doctrine theory of law in the *Killian* case is erroneous and contrary to the decision of this Court in *Bailey* v. *Central Vt. R. Co.*, 319 U. S. 350, 63 S. Ct. 1062, 1064:

"At common law the duty of the employer to use reasonable care in furnishing his employees with a safe place to work was plain. (authorities) That rule is deeply engrained in federal jurisprudence. (authorities). As stated by this court in the *Patton* case it is a duty which becomes 'more imperative' as the risk increases. Reasonable care becomes, then, a demand of higher supremacy, and yet in all cases it is a question of the reasonableness of the care, reasonableness depending upon the danger attending the place or the machinery, (authorities). That duty of the carrier is a 'continuing one' (authorities) from which the carrier is not relieved by the fact that the employees' work at the place in question is fleeting or infrequent."

In the first appeal, the Court of Appeals specifically stated on page 306, that the boards on some previous occasions had been found on or near tracks in the Ruberoid plant and yet held that the doctrine of failing to furnish petitioner's decedent with a reasonably safe place to work was inapplicable.

II.

In the first and second appeals petitioner was deprived of the benefits of the jury's verdict under Federal Employers' Liability Act.

In the first appeal, 191 F. 2nd 302, the Court of Appeals held that although the petitioner's evidence was sufficient to submit her case to the jury, the verdict rendered was arbitrary and capricious and must be set aside.

The Court, in fact, reweighed the evidence, came to the conclusion that petitioner's decedent was guilty of *some contributory negligence* and entirely disregarded the jury's verdict. This action deprived petitioner of her right to a jury trial under the provisions of the Federal Employers' Liability Act and is in direct conflict with the decision of this Court in *Wilkerson* v. *McCarthy*, 336 U. S. 53, 69 S. Ct. 413 where this Court said on page 62:

"Moreover, this Court stated some sixty years ago when considering the proper tribunal for determining questions of negligence: 'We see no reason, so long as the jury system is the law of the land and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' *Jones* v. *East Tennessee, V. & G. R. Co.*, 128 U. S. 443, 445, 9 S. Ct. 118, 32 L. Ed. 478. And peremptory instructions should not be given in negligence cases where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences.' *Washington & G. R. Co.* v. *McDade*, 135 U. S. 554, 572, 10 S. Ct. 1044, 1049, 34 L. Ed. 235. Such has ever since been the established rule for trial and appellate courts. See *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 67, 68, 63 S. Ct. 444, 451, 452, 87 L. Ed. 610, 143 A.L.R. 967. Courts should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function. In rejecting a contention that juries could be expected to determine certain disputed questions on whim, this Court, speaking through Mr. Justice Holmes said: 'But it must be assumed that the constitutional tribunal does its duty, and finds facts only because they are proved.' *Aikens* v. *State of Wisconsin*, 195 U. S. 194, 206, 25 S. Ct. 3, 6, 49 L. Ed 154.

"In reaching its conclusion as to negligence, a jury is frequently called upon to draw its ultimate conclusion on the issue of negligence. Here there are many arguments that could have been presented to the jury in an effort to persuade it that the railroad's conduct was not negligent, and many counter arguments which might have persuaded the jury that the railroad was negligent. The same thing is true as to whether petitioner was guilty of contributory negligence. Many of such arguments were advanced by the Utah Supreme Court to supports its finding that the petitioner was negligent and that the railroad was not. But the arguments made by the State Supreme Court are relevant and appropriate only for

consideration by the jury, the tribunal selected to pass on the issues. For these reasons, the trial court should have submitted the case to the jury, and it was error for the Utah Supreme Court to affirm its action in taking the case from the jury."

In the first appeal, 191 F. 2nd 302, the Court said on page 310:

"*We think* (italics ours) as a matter of law plaintiff's decedent was guilty of some contributory negligence."

This reweighing of the evidence was error and contrary to the decision of this Court in *Wilkerson* v. *McCarthy*, 336 U. S. 53, 69 S. Ct. 413, when this Court held that questions of negligence and contributory negligence were questions only for consideration by the jury.

The opinion in the first appeal on the question of contributory negligence is also directly contrary to and in conflict with the decision of that Court in the cases of *Fritz* v. *Pennsylvania R. R. Co.*, 185 F. 2nd 31; *N. Y. C. & St. L. R. Co.* v. *Boulden*, 63 F. 2nd 917 and is in conflict with *McCoy* v. *Chicago & Alton R. R. Co.*, 268 Ill. 244, 109 N.E. 1.

In the case of *Fritz* v. *Pennsylvania R. R. Co.*, 7th Circuit, 185 F. 2nd 31, the Court in affirming a $70,000.00 verdict in a death action under the Federal Employers' Liability Act, in discussing the question of contributory negligence said on page 35:

"• • • And by the same token we think the question of decedent's alleged misconduct as a cause of his death was for the jury." In the *Fritz* case, the deceased was in charge of the train crew and was engaged in removing boards and other obstructions from the tracks inside the building of an industrial plant. At the time a box car was shunted toward him into the building wherein he was working, he was walking in the direction of this box car

intent in his search for obstructions along the track. Had he looked up from the task at hand he would have seen this box car in ample time to prevent his fatal injuries which were caused when he was crushed between the box car and the industrial platform.

In *McCoy* v. *Chicago & Alton R. R. Co.*, 268 Ill. 244, 109 N.E. 1, plaintiff, a railroad switchman, while acting as foreman of a switching crew of defendant railroad, was riding a "steel hopper car". He had seated himself on the side beam of the car under the sloping end of the hopper with his legs hanging over the west side of the car. After seating himself in this position he took some cards containing his written orders from his pocket and began to read them. While in this position he was injured when his legs were crushed between the car upon which he was riding and a flat car which had been placed on a switch track by defendant's employees so that it "fouled" the track along which plaintiff was proceeding. There was evidence to the effect that plaintiff, had he looked, could have seen the obstruction and thus avoided being injured.

The Illinois Supreme Court, in holding his contributory negligence to be a question of fact for the jury, stated on page 4:

> "Whether the injury received was the result of contributory negligence of the defendant in error was also, under the state of this record, a question of fact for the jury. It was not negligence *per se* for him to ride on this car in the manner in which he did. The testimony on his behalf tended to prove that such was the customary place for a switchman to ride in making a switching movement with this kind of car. Defendant in error testified that he did not, at any time before the moment of his injury,

see the cars on the McCarthy track, or observe the position of the flat car at the north end of that string of cars. Whether, under all the circumstances, he exercised that degree of care which devolved upon him was for the jury to determine under proper instructions."

The foregoing, we believe, accurately states the law with respect to the determination of Wetherbee's lack of due care, if any, in failing to see the obstruction while he was properly performing a duty to which he had been assigned. He, like Fritz and McCoy, was performing another legitimate function of his employment. Fritz—looking for obstructions. McCoy—reading his orders. Wetherbee—in compliance with Rule 101, watching Venske at the road crossing for signals and looking for overhead and side obstructions, one of which he had just encountered and was apparently watching to see if it could be passed in safety when the car struck the piece of wood which caused the derailment. (R. 234-235).

His failure to see this second obstruction while intent on performing another function, (as was Fritz) does not constitute negligence as a matter of law. This is particularly true in view of the facts that the board which caused the derailment was of the same color and texture as the planking extending between and beyond either side of the "J" track (R. 198); and the planking between the "J" tracks was approximately one inch higher than the top of the rails of the "J" tracks. (R. 75)

The *"deceased was not required,"* under the rule of law enunciated in *N. Y. C. & St. L. R. Co.* v. *Boulden, "to keep his eyes glued upon any particular spot,"* 63 F. 2nd 917, 921.

In the second appeal, the Court of Appeals affirmed a directed verdict for respondent at the conclusion of peti-

tioner's case, regardless of properly admitted and undisputed evidence that respondent had disregarded applicable operating and safety rules 106 and 146 (R. 47-48, 50) and the reasonable and natural inference that had these rules been observed the derailment would not have occurred. This error on the part of the Court is further argued and explained in part V (pages 25 to 28) of petitioner's Argument in this Brief.

The Court of Appeals, in both appeals, deprived and failed to preserve for petitioner, a litigant under the Federal Employers' Liability Act, her right to a jury trial.

III.

On the first appeal the Court of Appeals erred in re-weighing the evidence and holding the verdict excessive.

On the first appeal the Court held the verdict excessive. This action necessarily depended upon reweighing the evidence and was error. That finding was the ultimate basis of the reversal and actuated the Court to "scan the trial record more closely for error". On a complete reading of the Court's opinion in the first appeal, 191 F. 2nd 302, but one conclusion can be reached: *the sure all would have been a verdict or judgment for a lesser amount.* The Court simply agreed with counsel for respondent that the verdict was excessive, *not* that one of the most eminent trial judges of the Court had abused its discretion; *not* that the verdict was *grossly* excessive; *not* that the verdict was monstrous nor that the excess appeared as a matter of law. Without one iota of foundation in the record (and we challenge the record) the Court found that because *it* determined the verdict was excessive, it had the power to reweigh the evidence and set aside the verdict of the jury and the judgment of the Trial Court

on the grounds that the verdict and judgment "was arbitrary and capricious", basing its authority to weigh the evidence upon the *obiter dicta* in the case of *Affolder* v. *N. Y. C. & St. L. R. Co.*, 339 U. S. 96, 70 S. Ct. 509. The language in that case indicates, at most, that if an award is *grossly excessive* or *monstrous*, the appeal court would have the power to review. That rule does not apply in the case at bar where the Court found the award *simply* excessive.

In further fortifying its position and authority, it found that the inherent right of trial by jury should be abandoned, citing the example of the Courts of the Fourth and Fifth Circuits where the general rule was relaxed to the degree that where the award was *grossly* excessive the Court was empowered to reweigh the evidence. Neither does this rule support the reversal of the judgment in the first appeal where the Court of Appeals itself found that the verdict was *simply* excessive. We respectfully submit for the Court's consideration, our theory that reversal of the petitioner's verdict and judgment in the first appeal was contrary to the established law as laid down by this Court and directly in contravention of the spirit of the Seventh Amendment to the United States Constitution.

To Summarize: The rule adopted to reverse petitioner's verdict and judgment is wholly consensual, confined to that Court *sans* precedent or foundation in law, and an assumption of power to supervise verdicts and judgments of lower Courts.

The Court came to the conclusion on Page 310, that petitioner's decedent was guilty of some contributory negligence, as a matter of law, and that therefore the verdict rendered was arbitrary and capricious. This was a question of fact for the jury. This finding was based on a re-

view of the trial record on the question of excessiveness and was erroneous and contrary to the decisions of this Court in the cases of *Southern Railway, Carolina Division* v. *Bennett,* 233 U. S. 80, 34 S. Ct. 566; *Barry* v. *Edmunds,* 116 U. S. 550, 6 S. Ct. 501 and *Affolder* v. *N. Y. C. & St. L. R. Co.,* 339 U. S. 96, 70 S. Ct. 509.

Further this Court has held that Courts of Appeals of the Federal Judiciary, may not reweigh the evidence and set aside the verdict because the judges would draw different inferences and conclusions than the jury drew, or because they think that another result would be more reasonable. *Tennant* v. *P. & P. U. Ry. Co.,* 321 U. S. 29, 35, 64 S. Ct. 409; *Lavender* v. *Kurn,* 327 U. S. 645, 653, 66 S. Ct. 740, 744.

Your petitioner, therefore, contends that in the first appeal the Court of Appeals committed error in reweighing the evidence and coming to the conclusion that the verdict was excessive, such action being exclusively within the power and authority of the Trial Court.

IV.

The Court of Appeals erred in the first opinion in holding that the method of actuarial calculations in a death action under the Federal Employers' Liability Act was erroneous.

The only basis upon which the verdict in the first appeal was reversed and remanded was that the actuarial computations made by the actuary were prejudicial error in that no allowances or deductions were made for decedent's Federal income tax and retirement benefits, 191 F. 2d 302 at page 311.

This Court has never had for decision in an action under the Federal Employers' Liability Act, this precise legal question and petitioner strongly contends that this

is an important question of Federal law which has not been, but should be, settled by this Court. In this respect we quote Associate Justice Frankfurter, who in the case of *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444, stated on page 73:

> "Perhaps no field of the law comes closer to the lives of so many families in this country than does the law of negligence, embedded as it is in the Federal Employer's Liability Act. It is most desirable, therefore, that the law should not be cloudy or confused."

This precise ruling by the Court is contrary in principle to the cases of *Chicago and N. W. Ry. Co.* v. *Curl*, 8th Circuit, 178 F. 2nd 497 and *Stokes* v. *U. S.*, 2nd Circuit, 144 F. 2d 82, and directly in conflict with *Smith* v. *Pennsylvania R. Co.*, 99 N.E. 2nd, 501 (Indiana Appellate 1950).

In the case of *Chicago & N. W. Ry. Co.* v. *Curl*, which was an action under the provisions of Federal Employer's Liability Act, judgment was affirmed for the plaintiff. One of the reasons advanced by the railroad for reversal was the refusal of the Trial Court to receive evidence offered by the defendant as to whether the present value of plaintiff's probable future earnings was to be computed upon his average gross income, or upon his average income, or upon his average income after deductions for income tax, railroad retirement, and other miscellaneous deductions. The Court said, on page 502:

> "The actuary who testified for appellee based his computations on appellee's average gross income for several years prior to the action, and the court refused to receive appellant's offer of proof of appellee's average net earnings after deductions. Appellant offers no authority in support of this contention * * *".
>
> "We conclude that there was no prejudicial error in the Court's refusal to accept appellant's offer of of proof. Appellee's expert witness made it plain that

> his evidence was based upon the experience of insurance companies and that neither the life expectancy of the appellee nor the earning power of money could be foretold with certainty. We may assume that the jury were aware of these facts, as well as the fact that the average earnings, net or gross, of the appellee for the future could not be definitely known."

In the case of *Smith* v. *Pennsylvania R. R. Co.*, a death action under the Federal Employer's Liability Act, a verdict for $100,000.00, was affirmed. One of the errors relied upon for reversal was that the Trial Court erred in refusing evidence as to deductions made from the wages of plaintiff's decedent for Federal income tax and Municipal income tax as bearing on the amount of recovery. The Court, in disposing of this proposition, said on page 504:

> "We hold that it is not proper to deduct from the annual income of plaintiff's decedent, Federal income taxes in determining the amount which the decedent would have contributed to his wife and children had he lived. Such taxes are too speculative to be considered by the jury. *Stokes* v. *U. S.*, 2 Cir. 144 F. 2d 82; *Chicago & N. W. R. Co.* v. *Curl*, 8 Cir., 178 F. 2d 497."

Petitioner, in the light of the above cited cases, strongly contends that the Court of Appeals, in the first opinion, was in error in holding that the method of actuarial calculation was improper and constituted the only prejudicial error. Under the doctrine enunciated in the case of *Urie* v. *Thompson*, 337 U. S. 163, 69 S. Ct. 1018, this Court is empowered to review the first opinion in this case and affirm the verdict of the trial court if it determines that the method of actuarial calculations in the first trial was proper.

V.

In the second appeal, the Court of Appeals erred in not submitting for the jury's determination the violation of safety rules as evidence of negligence in a death action under the Federal Employers' Liability Act.

In the second appeal the Court of Appeals held that respondent's safety rule 146 was not applicable. (R. 169-170). Petitioner earnestly contends that the Court in coming to this erroneous conclusion invaded the province of the jury, inasmuch as the applicability of safety rules is a question of fact to be decided by the triers of the facts, the jury and not by the Court of Appeals.

The undisputed testimony on the part of Delander, the switching foreman, was that the decedent was in his proper position when making this movement. (R. 45, 46). Delander testified that he was the conductor in charge of the train and that the entire crew was subject to and governed by rule 106 of respondent's general rules of operation and respondent's safety rule 146. (R. 43, 47, 50). Delander testified that he and his crew were engaged in yard service at the time of this movement on "J" track, and that respondent's safety rule 146 was applicable to yard service employees. (R. 50). He testified that no member of his crew other than himself walked south along the "J" track before this movement started southward on the "J" track (R. 48).

Venske testified he was familiar with the safety and operation rules of the respondent and, at the time of this southward movement down the "J" track, he was subject to the safety and the operation rules of respondent. (R. 60, 62).

The question arises what members of the crew were duty-bound to comply with rule 146 to walk along the "J"

track to inspect the track for obstructions. Under rule 106, Delander was responsible for the safety of the train and the observance of the rules (R. 47). Yet, he testified that no other member of the crew walked south along the "J" track before this movement started southward on the "J" track. (R. 48). This, in spite of the fact that this crew was engaged in yard service operating on a loading dock track and that respondent's safety rule 146 was applicable to employees engaged in such service (R. 50).

The Court of Appeals entirely disregarded or overlooked the testimony of Delander to the effect that safety rule 146 was applicable to the movement in question and petitioner earnestly contends that in this second appeal the failure to inspect this track before shoving into it was a proximate contributing cause to the death of petitioner's decedent.

In this case there was a violation of respondent's rule 106 (General Rules of Operation) and respondent's safety rule 146. These rules constitute respondent's own official standard of care. Labbatt, Master & Servant, Vol. 3, Sec. 909, p. 2423.

The language in the case of *Frabutt* v. *N. Y. C. & St. L. R. Co.*, 88 F.S. 821, is pertinent to show that it is within the province of the jury to pass upon the applicability of a railroad's safety rules. In that case, the District Court upheld a verdict for the plaintiff in a death action under the Federal Employers' Liability Act. The Court said, on page 827:

> "A violation of company rules relative to safety for the conduct of its employees, general in terms, will not ordinarily constitute negligence as a matter of law, nor will observance of such rules as a matter of law necessarily be due care. It is for the jury's determination as to whether or not the violation or

obeying of the rules, along with the evidence as a whole, constitutes negligence or lack of negligence. *A. T. & S. F. R. Co.* v. *Ballard,* 108 F. 2d 768, certiorari denied, 310 U. S. 646, 60 S. Ct. 1096".

In the case of *Jacobson* v. *Chicago & N. W. Ry. Co.,* (Supreme Court of Minnesota, 1946) 221 Minn. 454, 22 N.W. 2nd 455, judgment for the plaintiff was affirmed in an action brought under the Federal Employers' Liability Act for violation of the railroad's safety rules.

The Court said, on page 458:

"Rules and regulations governing the conduct of those employed in a business as complex and dangerous as switching operations in railroad yards are necessary to facilitate carrying on the business and to protect those employed therein. (Case cited). The adoption of rules 'admits the reasonable necessity for the conduct thereby prescribed'. (Case cited). Specific directions made part of rules constitute standards of care, presumably demanded by the exigencies of the business, to which all persons employed in the business are required to conform, and because the employer ordinarily will discharge his duty of enforcing such rules and other employees presumptively will obey them, an employee reasonably may rely on observance of the rules by other employees. (Case cited). * * *

"These rules are made for the guidance of the employees and are presumed to embody the views of the company, the observance of which it regards as essential to the safe and proper conduct of the business, and if in a given case it could be shown that an injury occurred by reason of such violation, the presumption of negligence would be strong, and in some cases, decisive. In some sense the judgment of the company as to the character of the Act would in this way be obtained, and it is a species of evidence to which the Company ought not to object. It is a mistake to suppose that only the company and its employees are concerned in these instructions. The pub-

lic are interested in having the best possible rules prescribed, and in having them observed and obeyed."

"Where harm is caused to an employee by violating a rule adopted to secure safe conduct of the work, a finding of negligence is justified. (Case cited)."

Petitioner contends that the Court of Appeals erred in affirming a directed verdict for the respondent in holding that respondent's Safety Rule 146 was not applicable. The Court of Appeals made the same error in the case of *Tennant* v. *Peoria & P. U. Ry. Co.*, 134 F. 2d 860, 867, in holding that violation of a safety rule alone was not sufficient to take the case to the jury. In the *Tennant* case this Court reversed the decision of the Court of Appeals and restored plaintiff's verdict. In the case of *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409, the deceased was a switchman. The case was submitted to the jury and a verdict was rendered for the plaintiff. The Court of Appeals for the 7th Circuit, reversed with directions to enter judgment in favor of the defendant and the Supreme Court reversed the decision of the Court of Appeals.

The facts, briefly, were that the deceased and his crew were engaged in some switching operations on a track known as B-28. Tennant was last seen walking around the rear end of the engine. Thereafter, the cars were pulled out of track B-28. Later, blood was discovered on that track and Tennant's hand was found nearby. The rest of his body was located somewhat farther on. There was no evidence of his having slipped or fallen from any part of the engine or cars.

The case was submitted to the jury on the theory that Tennant's death resulted from defendant's negligence in that its engineer backed the engine and box cars northward out of track B-28 without first ringing a bell. The failure

to ring the bell, which was not disputed, was alleged to be in violation of Rule 30 of defendant's rules for its employees. There was conflicting evidence as to whether this rule was for the benefit of the crew members who presumably were aware of switching operations or whether it was a customary practice for the bell to be rung under such circumstances.

The Supreme Court in restoring plaintiff's verdict, held that the jury was warranted in finding negligence on the part of the railroad in such a factual situation where there was evidence that the railroad company's written rules, as well as the custom and practice, required the ringing of the engine bell in just such a situation.

In the case at bar, as in the *Tennant* case, the question of negligence on the part of the respondent revolved around an applicable safety rule. In this case, respondent's safety rule 146. The undisputed evidence is that when the train started backing north on "K" track, approximately 200 feet north of the switch where Venske was standing, Delander the foreman, started walking south along the "J" track (R. 31, 57) Venske, at the same time, started walking southward to the truck crossing. (R. 57) It was the duty of every member of the crew, including Venske and Delander to keep a lookout. (R. 228, 229). The decedent threw the switch after the train had backed up approximately 200 feet so the train could proceed southward over onto the "J" track. Before the train ever got on over onto the "J" track, both Delander and Venske had already started walking southward toward the truck crossing.

Witness Delander testified that he and his crew were engaged in yard service at the time of this movement on "J" track, and that respondent's Safety Rule 146 was applicable. (R. 50). It is also undisputed that Delander, as

foreman, was the conductor in charge of the train and that under Rule 106 he was responsible for the safety of the train and the observance of the rules. (R. 47). It is undisputed that Rule 146 was not observed by the foreman, Delander, in that he required no one to walk the "J" loading track before starting the movement, just as in the *Tennant* case it was undisputed that the violation of a rule requiring the ringing of a bell before and upon making the movement in that case justified a finding of negligence, thus making a question of fact for the jury.

Under the law as enunciated by the Supreme Court of the United States in the *Tennant* case, petitioner earnestly contends that the Court of Appeals erred in affirming a directed verdict in the instant case, since a finding of negligence is justified, where harm is caused to an employee by the violation of his fellow employees of a rule adopted to secure safe conduct of the work.

CONCLUSION.

Petitioner therefore urges that the writ prayed for in the Petition be granted; that the judgment of the Court of Appeals, in the first appeal, 191 F. 2d 302, be reviewed and reversed by this Court and that the judgment of the District Court for the Northern District of Illinois, Eastern Division, be affirmed; or, in the alternative, that the judgment of the Court of Appeals in the second appeal be reviewed and reversed and remanded by this Court for a new trial.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 265

MILDRED M. WETHERBEE, ADMINISTRATRIX of the Estate of John P. Wetherbee, Deceased,

Petitioner,

vs.

ELGIN, JOLIET and EASTERN RAILWAY COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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PRINTED BY CHICAGO LAW PRINTING CO.

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ADDITIONAL STATEMENT OF THE CASE.

This is an action under the Federal Employer's Liability Act to recover damages for the death of John P. Wetherbee, a switchman employed by the defendant, who was killed when the car on the side of which he was riding was derailed because of a board lying on the tracks within the plant of the Ruberoid Company at Joliet, Illinois. Wetherbee was in active charge and control of the movement. Tr. pp. 47, 49, 74, 211) He was riding the forward end of the leading one of two cars being pushed by an engine (Tr. pp. 35, 189, 210), and under the rules of the company, it was Wetherbee's duty "to take a conspicuous position on the leading car * * * [and] maintain a sharp lookout

ahead" for obstructions along or on the tracks and to "regulate the movement by proper hand signals." (Tr. pp. 45, 46, 50, 216, 217). The board which caused the car to derail was lying on the rail nearest to Wetherbee (Tr. 192); apparently he never saw the board for he gave no signal of any kind. (Tr. pp. 211, 225) The first knowledge that any other member of the crew had that anything was wrong was when the engineer saw Wetherbee's body twist and fall between the boxcar and the Ruberoid Company's truck loading dock; he applied the brake immediately and stopped the movement within fifteen feet, which in his forty years of experience was the best stop anyone could have made. (Tr. pp. 189-190, 212, 225-226)

The case has been tried twice and been to the Court of Appeals twice. 191 F. 2d 302; 204 F. 2d 755. Upon both trials, the basic issue of negligence was whether any employee other than Wetherbee could or should have seen the board which caused the derailment, prior to the accident. Upon the first appeal, the Court of Appeals held that since the undisputed evidence showed that neither the engineer and the fireman from their respective positions in the cab of the engine, because of a curve in the tracks and the overhand of the boxcars, nor the foreman, walking behind the movement, could have seen the board, there was no evidence of negligence on their part. The Court held, however, that although the testimony of the other switchman, Venske, was indefinite on the point, it permitted the inference that he had walked close enough to the track to have seen the board, and was sufficient to take the case to the jury, observing, however, that upon another trial the evidence might refute any such inference. For a "totality of errors," some on the issues of negligence and some relating to damages, the Court reversed the judgment

and remanded the cause for a new trial. *Wetherbee* v. *Elgin, J. & E. Ry. Co.*, (C.A. 7), 191 F. 2d 302, 312. On September 21, 1951, the Court of Appeals denied plaintiff's petition for rehearing. (Tr. 11)

Plaintiff did not seek certiorari from this Court to review the rulings of the Court of Appeals, as she might have done under 28 U.S.C. §1254; instead she moved to advance the case for trial and the second trial commenced a week later. (Tr. pp. 13, 16, 17) Upon the second trial any uncertainty as to where Venske had walked was clarified by his detailed and positive testimony where he walked, from which it was clear that he was not within forty or fifty feet of the track where the board was lying. (Tr. pp. 57, 59, 61, 67, 68) Although Venske was called as plaintiff's witness, the trial court permitted plaintiff's counsel to cross-examine him as an adverse witness and to attempt unsuccessfully to impeach him. (Tr. pp. 62-66) At the conclusion of the plaintiff's evidence at the second trial, the court directed a verdict for the defendant. (Tr. 148) Upon the second appeal, the Court of Appeals held that Venske's more detailed testimony at the second trial would not "establish or support the inference that he should or could have seen the board which caused the derailment" and that defendant's rule 146, relied upon by plaintiff at the second trial, as a matter of law, "applies only in instances where cars are being moved along or upon loading, unloading and repair tracks," and hence was not applicable since the track involved in this case "was not a repair track and it was not being used for loading or unloading purposes." *Wetherbee* v. *Elgin, J. & E. Ry. Co.*, (C.A. 7), 204 F.2d 755. Plaintiff's petition for rehearing was denied May 22, 1953. (Tr. 174)

The petition for writ of certiorari was filed August 17, 1953.

RESPONDENT'S CONTENTIONS IN OPPOSITION TO THE PETITION FOR CERTIORARI.

Apparently petitioner hopes that after a second trial and second appeal, she may now review the rulings on the first appeal by petition for writ of certiorari filed nearly two years after the decision on the first appeal became final by the denial of her petition for rehearing. (Tr. p 11) Her "Petition for Writ of Certiorari" seeks to review only the decision of the Court of Appeals reversing the initial judgment in her favor (Pet. p. 1); of the six "Questions Presented," five are related to the first appeal, and only one, the sixth, arises only on the second appeal (Pet. pp. 9-10); of the five "Reasons for Granting the Writ," two (II and III) refer to rulings on the first appeal, two others (I and IV) refer to the sufficiency of the evidence on "both appeals" and only one (V) refers to an issue presented by the second appeal (Pet. pp. 10-12); the "Prayer" of the petition is for a writ of certiorari for the record on the first appeal (Pet. p. 12). In the supporting brief, the argument is confined to the sufficiency of the evidence at the *first* trial and to the correctness of certain rulings on the *first* appeal, save only for the single point that rule 146 presented an issue for a jury's determination.

Respondent makes the following contentions:

1. This Court has no jurisdiction to review the correctness of the rulings on the first appeal by writ of certiorari sought nearly two years after the denial of rehearing on the first appeal.

2. No question as to the sufficiency or the competency of the evidence at the first trial is presented by the record before this Court.

3. The Court of Appeals did not "re-weigh" any conflicting evidence and thereby deprive petitioner of any constitutional right to a trial by jury. The Court of Appeals held that upon the uncontradicted evidence, plaintiff had failed to make a submissible case for the jury.

SUMMARY OF THE ARGUMENT.

I.

This Court has no jurisdiction to review the rulings of the Court of Appeals on the first appeal by certiorari sought at this time.

1. Certiorari must be applied for within ninety days of the denial of the petition for rehearing below.

28 U.S.C. § 2101;

Morse v. *United States,* 270 U. S. 151;

Commissioner v. *Estate of Bedford,* 325 U. S. 283, 288.

2. This Court has no jurisdiction to review the decision upon an earlier appeal upon certiorari to review the decision on second appeal.

Toledo Scale Co. v. *Computing Scale Co.,* 261 U. S. 399, 418;

Parker v. *Illinois,* 333 U. S. 571, 576.

II.

No ruling of the Court of Appeals on the first appeal is preserved for review upon the record before this Court.

1. Without a transcript of the evidence, this Court cannot consider the sufficiency or the competency of the evidence at the first trial.

Halbert v. *United States,* 283 U. S. 753, 764;.

San Antonio, etc. Ry. Co. v. *Wagner,* 241 U. S. 476, 482.

2. The opinion on the first appeal is not a part of the record, and statements of fact in the opinion will not supply the want of such facts in the record.

United States v. *Hark,* 320 U. S. 531, 535;

England v. *Gebhardt,* 112 U. S. 502, 506;

Johnson v. *United States,* 160 U. S. 546, 553.

III.

The Court of Appeals Decided the Issues Correctly.

A.

On the First Appeal.

1. Except as to the possible inference as to Venske's conduct, the evidence at the first trial was insufficient on the issues of negligence.

Killian v. *Pennsylvania R. Co.*, 336 Ill. App. 152, 82 N.E. 2d 834.

2. The actuarial calculations were incompetent.

Chicago, B. & O. R. Co. v. *Kelley* (C.C.A. 8) 74 F. 2d 88, 84;

Kansas City S. Ry. Co. v. *Leslie*, 238 U. S. 599, 604.

B.

On the Second Appeal.

1. The trial court's exercise of its right to direct a verdict for insufficiency of evidence does not infringe the Seventh Amendment.

Galloway v. *United States*, 319 U. S. 372, 389;

Herron v. *Southern Pacific Co.*, 283 U. S. 91, 96.

2. The testimony of Venske at the first trial, admitted for purposes of attempted impeachment, does not create a conflict in the evidence.

Southern Ry. Co. v. *Gray*, 241 U. S. 323, 337;

Chicago, etc. Ry. Co. v. *Muldowney* (C.C.A. 8) 130 F. 2d 971, 975;

Carroll v. *Krause*, 295 Ill. App. 552, 561.

3. The construction of rule 146 was a question of law for the court.

Great Northern Ry. Co. v. *Hooker* (C.C.A. 8), 170 Fed. 154, 159.

4. Rule 146 was as a matter of law not applicable to the movement in this case.

See Argument.

ARGUMENT.

I.

This Court has no jurisdiction to review the rulings of the Court of Appeals on the first appeal by certiorari sought at this time.

We respectfully submit that this Court has no jurisdiction at this late date, after a second trial and a second appeal, to review the correctness of the rulings of the Court of Appeals on the first appeal. Under 28 U.S.C. § 2101 certiorari must be applied for within ninety days after the denial of the petition for rehearing below. *Morse* v. *United States,* 270 U. S. 151. This Court has said that this is "more than ample for an unsuccessful litigant to determine whether to seek further review." *Commissioner* v. *Estate of Bedford,* 325 U. S. 283, 288. Here the petition for rehearing on the first appeal was denied on September 21, 1951 (Tr. p. 11) and the application for certiorari was not made until August 17, 1953. Under such circumstances, this Court has no jurisdiction to review the rulings on the first appeal. *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U. S. 399, 418; *Parker* v. *Illinois,* 333 U. S. 571, 576.

The first appeal to the Court of Appeals was not an interlocutory appeal, as in *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.,* 240 U. S. 251, but an appeal from a final judgment entered after a trial on the merits. While the decision of the Court of Appeals, remanding the case for new trial, was not a final one, it "involved an issue fundamental to the future conduct of the case" and was reviewable by a timely petition for certiorari. *United States* v. *General Motors Corp.,* 323 U. S. 373, 377; *Land* v. *Dollar,* 330 U. S. 731, 734.

Petitioner relies upon *Urie* v. *Thompson*, 337 U. S. 163 as sustaining her right to a review of the decision on the first appeal upon this present application for certiorari. But the *Urie* case was tried in the state courts of Missouri, and the decision of the Supreme Court of Missouri on the first appeal, which reversed a judgment on demurrer to the complaint and remanded the cause for trial, "was not final; it was interlocutory and not reviewable here within the meaning of our jurisdictional statute. 28 U.S.C. § 344 (b) [now § 1257 (s)]." 337 U. S. at 171. After final judgment against him on the second appeal, Urie "brought the claim to this Court at his first opportunity." 337 U. S. at 171.

But petitioner here has not brought her claims to this Court at her first opportunity. This Court's power to review by certiorari the judgments and decrees of Courts of Appeal is not limited to "final judgments" as it is in the case of state court proceedings. (Compare 28 U.S.C. § 1254 with § 1257) A "final judgment" in a Court of Appeals is not a prerequisite to review by certiorari here. Review by certiorari may even for had in advance of a decision by the Court of Appeals. *Ex parte Quirin*, 317 U. S. 1; *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579. The decision of the Court of Appeals on the first appeal did, for all time, finally dispose of the $80,000 judgment in petitioner's favor. Once that judgment was vacated, pursuant to the mandate of the Court of Appeals (Tr. p. 10), it ceased to exist, and any question of the sufficiency of the evidence to sustain it, or concerning the amount of the verdict became moot. If petitioner desired a review of those rulings of the Court of Appeals, she had her opportunity to seek it; when she failed to apply for certiorari within the ninety days, she lost her right to review that

decision, not because of estoppel or waiver, but because after the ninety-day period fixed by the "jurisdictional statute," this Court is "expressly denied power to review it."

We submit that insofar as the petition for writ of certiorari seeks a review of any ruling upon the first appeal, the petition must be dismissed for want of jurisdiction of this Court to consider it.

II.

No ruling of the Court of Appeals on the first appeal is preserved for review upon the record before this Court.

We submit there is an additional reason why this Court cannot now review any ruling as to the sufficiency or the competency of the evidence at the first trial: none of that evidence is contained in the transcript of record before this Court. Save for the complaint and answer (Tr. pp. 3, 8), the transcript commences with the filing of the mandate of the Court of Appeals on the first appeal. (Tr. 10) Without a transcript of the evidence, this Court cannot consider the sufficiency or the competency of the evidence at the first trial. *Halbert* v. *United States,* 283 U. S. 753, 764; *San Antonio, etc. Ry. Co.* v. *Wagner,* 241 U. S. 476. 482.

The references in the petition and supporting brief to the opinion on the first appeal do not supply the want of the evidence. This Court reviews the record in the case, not the opinion of the court below. The opinion on the first appeal is not contained in the transcript here. Even if it were printed in the transcript, it would not be a part of the record (*United States* v. *Hark,* 320 U. S. 531, 535; *England* v. *Gebhardt,* 112 U. S. 502, 506) and statements in

an opinion will not supply the want of such facts in the record proper. *Johnson* v. *United States*, 160 U. S. 546, 553.

The question whether the evidence at the first trial would have permitted an inference of negligence on the part of someone other than Venske, or made a jury question of Wetherbee's contributory negligence, or sustained the amount of the verdict, the question whether the actuarial calculations were made on erroneous and improper bases, the question of the prejudicial effect of repetitious instructions on the "safe place to work" doctrine—none of these questions can be considered by this Court in the absence of a transcript of the record of the first trial. None of these issues were raised on the trial below. The issues of negligence and contributory negligence must be determined now upon the evidence adduced by the plaintiff at the second trial and upon which she rested her case. No actuarial evidence was offered on the second trial; hence no question of the competency of such evidence generally, or of the admissibility of particular calculations was presented by this record to the trial judge or upon the second appeal, and no such question is reviewable here. Beyond what limits a verdict would be deemed excessive is not raised upon a record upon which plaintiff was found not entitled to recover at all. No question of the sufficiency or the competency of the evidence at the first trial was before the Court of Appeals on the second trial; no such question was decided by that court in its second decision, the only judgment which is subject to review at this time. In the absence of a record presenting the questions and in the absence of a reviewable ruling below, none of the questions argued as arising on the first appeal are presented for review now.

III.

The Court of Appeals Decided the Issues Correctly.

A.

On the First Appeal.

We do not hesitate for a moment to defend the opinion on the first appeal on the merits. The general acceptance of the decision by other reviewing courts is ample proof of the soundness of the decision. *Empire Dist. Elec. Co.* v. *Rupert* (C.A. 8), 199 F. 2d 941, 945; *Hall* v. *Chicago & N. W. Ry. Co.*, 249 Ill. App. 175, 190, 110 N.E. 2d 660; *Dempsey* v. *Thompson*, (Mo. 1925), 251 S.W. 2d 42, 44; *Louisville & N. R. Co.* v. *Young's Adm'x.* (Ky. 1952), 253 S.W. 585, 590. We submit that the court properly followed *Killian* v. *Pennsylvania R. Co.*, 336 Ill. App. 152, 82 N.E. 2d 834, certiorari denied by this Court, 338 U. S. 819, and distinguished a temporary obstruction such as this board, from the permanent structures involved in the cases relied upon by the plaintiff. 191 F. 2d at 306-308. The court did not "reweigh" any conflicting evidence on negligence. The court held that the *undisputed* evidence would not support any inference of negligence on the part of the engineer, the fireman, the foreman of the crew or the section foreman. 191 F. 2d 307. Upon the only charge upon which the evidence permitted conflicting inferences, however tenuous, *i.e.* the evidence of where Venske walked, the court held the evidence on the first trial sufficient to take the case to the jury. 191 F. 2d at 308. If, as plaintiff contended on the first appeal, it was actionable negligence for some employee other than Wetherbee, at a greater distance from the track than he was, to fail to see the board on the rail, the conclusion is inescapable that Wetherbee himself was similarly guilty of "some contributory negligence," as the

Court of Appeals held (191 F. 2d at 310), for according to the undisputed testimony of plaintiff's witness, O'Day, which was identical at both trials (Tr. p. 26), Wetherbee was in charge of the movement and it was his specific duty to "maintain a sharp lookout ahead" and to be on the lookout for rubbish and obstructions lying near the tracks. (Tr. 211, 216, 217) The Court of Appeals correctly decided the issues of negligence and contributory negligence upon the uncontradicted evidence without "reweighing" any conflicting evidence.

The Court of Appeals likewise correctly decided the questions affecting the amount of the recovery. The court did not hold that it could set aside the verdict simply for excessiveness; it specifically held the contrary (191 F.2d at 310) and it has since adhered to that ruling. *Flener* v. *Louisville & N.R. Co.*, (C.A. 7), 198 F. 2d 77, 80; *Kaminski* v. *Chicago River & I.R. Co.*, (C.A. 7), 200 F. 2d 1, 4. The plaintiff has no legitimate ground of complaint that the Court of Appeals, believing that an injustice had been done which was beyond the court's power of direct correction, proceeded to "scan the trial more closely for error." If there were errors committed on the trial which affected the amount of the verdict, whether hard to find or not, plaintiff was not legally entitled to the verdict, and the court found two plain errors which affected the amount of the verdict: the jury's disregard of Wetherbee's obvious contributory negligence, (which we have discussed, *supra*) which made its verdict arbitrary and capricious (191 F.2d at 310), and the error in admitting the actuarial calculations. Upon the latter issue, the Court of Appeals did not hold that actuarial evidence is generally inadmissible, but only that the specific calculations of this witness were incompetent, having been based upon dece-

dent's probable future gross earnings, rather than upon the pecuniary benefits which the beneficiaries might reasonably have received had he not died of his injuries, which is the true measure of damages. *Chicago, B. & Q. R. Co.* v. *Kelley* (C.C.A. 8), 74 F.2d 88, 84. Since it would have been reversible error to instruct the jury to base their verdict on decedent's total earnings, reduced to its present cash value (*Kansas City S. Ry. Co.* v. *Leslie,* 238 U.S. 599, 604), it was obviously improper to admit into evidence as a guide for the jury, calculations as to the present value of his gross earnings. The Court of Appeals properly held this testimony was inadmissible.

We submit that even if timely application had been made, review by certiorari of the decision of the Court of Appeals on the first appeal was not warranted. At this late date, and in the absence of the transcript of the first trial, review must be denied.

B.

On the Second Appeal.

We come now to the single question argued and decided on the second appeal, and reviewable by certiorari now: the sufficiency of plaintiff's evidence at the second trial to withstand a motion for directed verdict at the close of plaintiff's evidence. After extended argument, the trial judge, Judge Briggle, experienced by years of service in the trial courts and in relief on the Court of Appeals, held the evidence, after the clarification of Venske's testimony, was insufficient. Upon appeal a panel of the court, none of whom had participated in the first decision, affirmed the judgment. Thus seven judges, all with years of trial and appellate court experience, have heard and rejected petitioner's contention that the evidence now before this

Court warrants submission to a jury. The consensus of their considered and experienced judgment strongly supports the conclusion that this case is not one for review under Rule 38.

Petitioner makes the familiar complaint that she has been deprived of her right to a trial by jury under the Seventh Amendment. For nearly a century repeated decisions have settled the rule that the Amendment does not deprive federal courts of the power to direct a verdict for insufficiency of evidence. *Galloway* v. *United States,* 319 U.S. 372, 389. Where the evidence is undisputed and in the absence of conflicting inferences, the judge has the power *and the duty* to direct a verdict. *Herron* v. *Southern Pacific Co.,* 283 U.S. 91, 96. The defendant also has a constitutional right to a trial by jury "according to the rules of the common law" and defendant's constitutional right required that the case be withdrawn from the jury's consideration when plaintiff's evidence failed to make a *prima facie* case.

Significantly, petitioner does not argue in her brief that the evidence on the second trial was sufficient to take the case to the jury on the theory which was sustained on the first appeal, *i. e.* that Venske walked close enough to the track to have seen the board. A half-hearted effort is made in the "Statement of Matter Involved" (Pet. p. 9) to assert that the attempted impeachment of Venske raised a conflict in the evidence. But it is well settled that former testimony read for purposes of impeachment is not affirmative or substantive evidence tending to establish the truth of the statement, and it does not raise a conflict in the evidence. *Southern Ry. Co.* v. *Gray,* 241 U. S. 333, 337; *Chicago etc. Ry. Co.* v. *Muldowney,* (C.C.A. 8), 130

F. 2d 971, 975; *Carroll* v. *Krause,* 295 Ill. App. 552, 561. Moreover, Venske explained the supposed contradiction by stating that he did not understand the question called for an answer whether he walked in an absolutely direct, straight line. (Tr. 74) This leaves the matter for determination solely on Venske's direct and positive testimony (Tr. pp. 57, 59, 61, 67, 68), supplemented by the path he traced on the plat. (Tr. 61, 146). The Court of Appeals correctly held that "As the record now stands, there is nothing in Venske's evidence that would establish or support the inference that he should or could have seen the board which caused the derailment." 191 F.2d at 757.

Defendant's rule 146 did not present any issue for a jury's consideration. That rule does not require that someone walk along the track in advance of every movement. By its very language, the rule applies only to movements "when coupling onto or moving cars on any loading, unloading or repair track." (Tr. p. 47) But the "J" track, at the place where the derailment occurred, according to the uncontradicted evidence, was not a repair track, nor was it being used for loading or unloading railroad cars. (Tr. p. 48) The construction of the rule, to determine its applicability, presented a question of law for the court. Van Devanter, C.J., in *Great Northern Ry. Co.* v. *Hooker* (C.A.C. 8), 170 Fed. 154, 159. If as a matter of law, the rule was not applicable to this movement, the fact that the rule was not literally complied with raised no issue for a jury's determination. We submit the Court of Appeals reached the proper conclusion when it stated (204 F.2d at 757):

> "We cannot agree that rule 146 was applicable.
>
> "An examination of the rule makes it apparent that it applies only in instances where cars are being

> moved along or upon loading, unloading or repair tracks. There is nothing in this record to show that at the time and place of the unfortunate occurrence the J tracks were being used for repair purposes or for loading or unloading. The obvious object of rule 146 is to protect men working about the car under repair, or working in or about cars being loaded or unloaded, and also to protect against collision with equipment which might be in use by such workers. In the case at bar, the track J was not a repair track and it was not being used for loading or unloading purposes."

The fact that in other cases the violation of an applicable rule has been held to present a jury question does not in any way aid petitioner here.

The construction of rule 146 for which petitioner contends would require the railroad to have some one in addition to Wetherbee *also* inspect the track ahead of the movement. Neither the language of the rule or any standard of reasonable care required any such duplication of work. "Granted that defendant railway had a duty to have someone inspect the tracks before the cars and engine passed, it was Wetherbee's duty to make that inspection by watching the track ahead of the movement." 191 F.2d at 307. "Contrary to his specific duty, Wetherbee did not maintain a sharp lookout ahead, for nothing obstructed his view and he could have seen the board if he had looked." 191 F. 2d at 310. He cannot charge any other employee with the consequences of his own failure. The responsibility for this tragic accident was solely his own.

Conclusion.

We respectfully submit that the six judges of the Court of Appeals have correctly decided both these appeals. If plaintiff believed that the rulings on the first appeal were wrong, she should have sought certiorari then. When instead she took her chance on the outcome of a second trial, she lost all right to have any evidentiary rulings reviewed except as they might be presented again on the second trial. The single question presented by the record of the second trial, based upon her construction of rule 146, is frivolous and wholly lacking in merit. The petition for certiorari should be dismissed.

Respectfully submitted,

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